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IN THE MATTER of the Ontario Human Rights Code
R.S.O. 1970, C.318, as amended.

AND IN THE MATTER of two Complaints made by
Mr. Kerry Segrave of Hamilton, Ontario that
he was refused recruitment, refused employment
and refused training because of his sex and
marital status by Zeller's Limited and that
Zeller's Limited established or maintained
an employment classification or category
that by its description or operation excluded
persons from employment.

Appearances

Sydney L. Goldenberg	- Counsel for the Ontario Human Rights Commission and the Complainant, Mr. Kerry Segrave
Michael E. Royce	- Counsel for the Respondent, Zeller's Limited

REASONS FOR DECISION

The salient facts giving rise to this inquiry are these. The Complainant, Mr. Kerry Segrave, saw an advertisement in the Hamilton Spectator on September 21, 1974 indicating that Zeller's Limited, the Respondent, was seeking to employ for management recruitment, personnel manager trainees and credit management trainees. This advertisement excited the Complainant's interest and he arranged for an interview on Tuesday, September 24, 1974. The interview was conducted by Miss Elizabeth Sendall, who at the time was a personnel manager trainee of the Respondent company. The Complainant told Miss Sendall that he was interested in the personnel management position. It is common ground that Miss Sendall's response was that as far as she knew there were only women in the position

of personnel management trainees in the Zeller's Company and that the wage scale was approximately \$90.00 per week and that was too low for the Complainant to consider. The Complainant testified, but Miss Sendall denied in her evidence, that he indicated that he was not troubled by the low salary as the money was not an important factor. The Complainant also testified, but again denied by Miss Sendall, that the latter made the following comment:

"Don't report this to the Labour Department.
We discriminate. We only want women as
personnel managers because a woman would
not go to a man with her problems."

The Complainant insisted that the above were Miss Sendall's exact words and that he recorded them in writing about one hour after the termination of the interview. The notes were subsequently discarded well before the commencement of this hearing.

Having been so abruptly deterred from pursuing the personnel manager trainee position, the Complainant then expressed an interest in the credit management trainee position. He was given an application for employment form which he filled out and upon its completion, Miss Sendall took out a yellow form entitled "Store Management Training Program, Preliminary Interview", marked as Exhibit 13 in these proceedings, and then she commenced to ask the Complainant a series of questions. One of the questions put to the Complainant was in relation to his marital status. He said he was divorced. He was asked how long. He responded, three months. Then Miss Sendall, apparently reading from the back of the yellow form, said:

"It says here that if you have been separated
or divorced within the last two years that is
undesirable."

Miss Sendall testified that she said to the Complainant that the fact that

he had been a divorcee for three months was a sign of instability in his background which could cross over into his business life as well. She concluded that she could not offer the Complainant a position and added, moreover, that the fact that Mr. Segrave was unemployed was also undesirable. She however, held out to the Complainant some flicker of hope by stating that he could come back in two years time when he was divorced for a longer period. The Complainant left the interview and later that day lodged a complaint with the Human Rights Commission.

Counsel for the Ontario Human Rights Commission and the Complainant argues that these facts amount to a contravention of S.4 (1)(a), (b), (c) and (e) of the Ontario Human Rights Code on the basis of discrimination by reason of sex and marital status.

The sexual discrimination allegation shall be examined first. Taking the Respondent's case at its highest, it concedes that Miss Sendall, who was clothed by the Respondent corporation with the power to recruit or decline recruitment to applicants seeking managerial positions with the Respondent said in no uncertain terms to Mr. Segrave, at the very outset of the interview, that as far as she knew there were only women personnel management trainees in the company and that the wage scale was too low for him to consider the position. Counsel for the Respondent, in argument, made much of the fact that faced with those comments Mr. Segrave failed to press the matter with Miss Sendall and insist that he was nevertheless desirous of applying for the position. Counsel pointed to the evidence of Miss Sendall that although the personnel management trainee position was normally occupied by women, if Mr. Segrave had said that he still wanted to apply for it, she would have proceeded to give him a complete interview for that position. Given the realities of the relationship that exists between

an interviewer and a person seeking employment, I think the words spoken to Mr. Segrave in the instant case would lead any reasonable man to infer that it was pointless for him to pursue the matter any further. Miss Sendall would not have made these statements if she did not wish to convey to the Complainant that the Respondent company practised discrimination against men with respect to the personnel manager trainee position. It was meant to discourage the Complainant from even bothering to complete an application for this position. What other motive could she have had in making the statement? I do not think that it is incumbent upon an applicant for a job, in the face of such remarks, to persist and to take further steps which would obviously be futile in the faint hope that he may secure the position. I think it is fair for the Complainant to assume that the remarks of Miss Sendall indicated a corporate policy on the part of Zeller's to discriminate against males for this particular category of job and that it was closed to him. So this Board finds that even upon the evidence adduced by the Respondent company itself there has been a contravention of Section 4 (1)(a) of the Ontario Human Rights Code.

But this Board is not content to stop there. It prefers, in terms of credibility, the detailed version of the interview given in Mr. Segrave's evidence to that of Miss Sendall. She was vague about her memory of Segrave and when called upon to identify him in the hearing room she firmly picked out the wrong man. She took no notes of the interview and was uncertain about many of the circumstances such as whether Mr. Segrave filled out an application or whether the interview took place in the morning or afternoon of September 24th. Mr. Segrave, on the other hand, was most

definite as to the words spoken and with respect to all the other circumstances and details surrounding the interview. He made notes shortly after the interview and put down the words that passed between himself and Miss Sendall. He was sufficiently provoked by the interview to file a complaint with the Ontario Human Rights Commission that very day. Accordingly, this Board is prepared to find that Miss Sendall went further than her aforementioned remarks and did add words to the effect that Mr. Segrave shouldn't report to the Labour Department that Zeller's Limited does discriminate against males in the personnel management field. This Board accepts the Complainant's version and observes that this is one of the few cases where there has been direct evidence of discrimination.

I next turn to the question of marital status. In conducting the interview of the Complainant for the credit management trainee position, Miss Sendall was utilizing Exhibit 13, a form provided to her by the head office of the Respondent in Montreal for the purpose of evaluating applicants. Question 4 of the Scoring Instructions on the reverse side of this document reads as follows:

If separated or divorced in past two years, circle U.

If widowed in past two years, circle ?.

Any other answer circle D.

D ? U

At the bottom of the sheet there are instructions which indicate that if an applicant has obtained one or more U's or two or more question marks at the completion of the questioning he will normally be rejected for any position. In addition to this form, the interviewer is also provided with a booklet styled "Interview and Selection Wrap-Up Form 193", Exhibit 10 in the proceedings, which includes a form similar to Exhibit 13 and contains the following provision:



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Are you?

Single ☐ Married ☐ Separated ☐ Divorced ☐ Widowed ☐
Date Date Date Date

(U) If separated or divorced in past two years.

(?) Widowed in past two years.

(D) Other

with instructions to circle the appropriate symbol.

In another form contained in Exhibit 10 which is headed "Confidential Weighted Scoring Sheet For Use With Employment Application, Not To Be Discussed With Applicant", the following scoring instruction is given:

"If separated or divorced *in past two years*, this is a knock-out, score 0. If widowed *in past two years*, score 1. If married, score 5. If single, score 3 (Single includes those separated, divorced or widowed more than two years) KO"

In terms of interpreting the cumulative scoring, the interviewer is instructed as follows:

"ONE KNOCK OUT: process applicant further only if total weights indicate *good risk* (100 or better).

TWO OR MORE KNOCK OUTS: applicant should not be processed further."

Miss Sendall was familiar with Exhibit 10 and the forms contained therein and knew that the Preliminary Interview Sheet that she was using, Exhibit 13, was merely a short form for the longer questionnaire contained in Exhibit 10. The long form referred to K.O.'s rather than U's but the symbols designated the same effect and the forms were substantially the same.

Of course the Complainant scored a 'U' on question 4 of Exhibit 13 because of his recent divorce. Miss Sendall testified, however, that there were other grounds which resulted in his poor score and these formed part of the reasons for which the Complainant was turned away. She testified that she didn't believe that the clothes that the Complainant was wearing at

the interview were appropriate. That warranted another 'U' entry. In addition, she was under the impression that the applicant was unemployed and that his departure from his last employment was not voluntary. That, too, rated him a 'U'. These reasons are spurious. The Complainant testified that his clothing on that day was very much the same as he was wearing before this Board and consisted of a clean open-neck sport shirt and a pair of conservative brown slacks. Miss Sendall's recollection was that he was wearing blue jeans and had unkempt hair below his collar but does not remember if he was wearing a jacket. For the reasons given earlier this Board does not place very much strength in Miss Sendall's memory and, moreover, there is no doubt that the Complainant was prepared to wear proper business attire in the event that he was awarded the position. With respect to the question relating to his involuntary leaving of his previous employment, Miss Sendall conceded on the stand that she had no information that his previous employer no longer wished to renew his contract and that she couldn't now say why she thought his employment was involuntary. She didn't specifically inquire into the reason why he didn't renew his employment and accordingly there was no basis for her entering a 'U' entry in connection with this matter. So, if one objectively considered the merits of the 'U' entries, apart from the marital status question, along with the fact that Miss Sendall indicated that the latter question was as equally important as the other factors, then it becomes patently clear that the discrimination with respect to marital status was not only a proximate cause of the Complainant being denied recruitment but was a major or primary cause for his failure to become employed. In any event, even if this Board were precluded from inquiring into the validity of the reasons with respect to the other grounds for refusing recruitment, there is no doubt that the improper



discrimination was a ground or a proximate cause for Miss Sendall's decision. The Board follows the reasoning of Hughes, J. in Regina v. Bushnell Communications Ltd. et al (1974) 1 O.R. (2d) 442, affirmed (1974) 4 O.R. (2d) 288 wherein he considered the interpretation of Section 110 (3) of the Canada Labour Code R.S.C. 1970 C.L-1 making it an offence for an employer to "refuse . . . to continue to employ any person . . . because the person is a member of a trade union". He held that it was sufficient, if the evidence satisfied the court, that membership in a trade union was present to the mind of the employer in his decision to dismiss, either as a main reason, or one incidental to it, or as one of many reasons regardless of priority. He said at p. 447:

"In considering an enactment devoid of the words 'sole reason' or 'for the reason only' applied to the act of dismissal and resting only on the word 'because', the Court must take an expanded view of its application."

I think the same reasoning is applicable to the wording of section 4 (1) (a) and accordingly this Board finds that there has been a contravention of that subsection.

The Respondent company was attempting to recruit prospective personnel and credit managers. The initial interview was the first step to that ultimate goal. If the applicant had successfully passed the interview and the intelligence and psychological testing that would have ensued, he would have been hired as a trainee in which case he would have been an employee of the company and received a salary for the duration of the training period. Therefore, this Board finds that the above-mentioned discriminatory practices during the interview process constituted a refusal to employ

the Complainant because of sex and marital status and that amounts to a contravention of subsection (b) of section 4 (1). The Board, however, feels there has been no violation of subsection (c) for that provision assumes that the individual discriminated against was at the material time an employee of the Respondent.

The Complaint as amended, also alleges contravention of section 4 (1)(e) of the Ontario Human Rights Code in that the Respondent established or maintained an employment classification or category that by its description or operation excluded the Complainant from employment because of his sex and marital status. As to sex discrimination, counsel for the Commission and the Complainant pointed to various documents and memoranda emanating from the head office of the Respondent company which were adduced in evidence. In those documents different gender descriptions are used in relation to different kinds of jobs. It was suggested that because personnel management trainees and sales staff are referred to in the feminine gender and that executives, such as supervisors, are referred to in the male gender, that indicates that the Respondent company established different employment classifications or categories for the two sexes. The Board does not think, however, that this evidence, by itself, is very probative as it does not necessarily point to discrimination. The use of female or male pronouns may be used in the corporate literature for purposes of convenience only because more males or more females happen to presently perform particular jobs. Accordingly, little weight can be attached to this evidence. Moreover, although in some of the evidence put in through the witness, Janet Redden, and in particular Exhibit 8 which is an extract from the Personnel Handbook provided to personnel managers and relating to the subject of recruiting store management trainees, there is some suggestion that the Respondent has contravened section 4 (1)(e) in respect of certain managerial positions such

as junior executive trainees, this Board does not think that it is properly the subject-matter of this proceeding as it relates in no way to the Complainant Kerry Segrave or to the incidents concerning which he has lodged his Complaints. This inquiry was established to examine the circumstances surrounding the Complainant's allegations. It cannot be a wide-ranging inquiry into the general practices of the Respondent company relating to other individuals and other branch stores in various cities with no connection to the Complainant or the position that he sought or the events about which he seeks redress. Accordingly, although there may be some basis for suggesting that the Respondent may with respect to certain other categories of job discriminate by reason of sex, the evidence that was adduced was outside the subject-matter falling within the allegations contained in the Complaint.

However, when one considers the instructions to Janet Redden of Mr. Cernanec, a store manager, on one occasion, and of Mr. Nobes, Personnel General Manager for Canada, on another, suggesting that the position of personnel manager in the Respondent company was closed to males, coupled with the response that the Complainant received at the interview, it may be concluded that the Respondent did maintain the employment classification or category of personnel manager that by its description excluded males in contravention of section 4 (1)(e).

The Board comes to the same conclusion with respect to the allegation that section 4 (1)(e) has been contravened on the basis of discrimination because of marital status. The evidence is overwhelming and expressly contained in corporate documents, Exhibits 10 and 13, making clear that with respect to all management training positions, that class or category of job excluded people who have been divorced within two years and this was a basis

of discrimination in the circumstances of this case. Section 4 (1)(e), therefore, has been contravened in that a particular category of job within the Respondent corporation was closed to Kerry Segrave because of his marital status.

Corporate responsibility can be attributed to all of the above-mentioned contraventions of the Ontario Human Rights Code. Exhibits 10 and 13 are corporate documents originating from head office and are intended to be directives to the staff of the Respondent located in various stores throughout Canada. These documents contain the offensive material relating to divorced individuals with respect to managerial training positions and there is no doubt that the Respondent has directly contravened section 4 (1) (e). Mr. Nobes, and to a lesser extent Mr. Cernanec, in describing the job of personnel manager as not being available to men, were, in view of their respective positions, the alter ego, or directing mind of the Respondent in respect to such matters. Thus the Respondent also has contravened section 4 (1)(e) in relation to sex discrimination.

Miss Sendall by her conduct contravened section 4 (1)(a) and (b) of the Code. The issue then arises as to whether there is corporate responsibility for her actions.

The policies of the Respondent were amply demonstrated by Mr. Robert MacPherson, the store manager of the Respondent company on Mohawk Road in Hamilton, who enunciated the rationale for the question in the Preliminary Interview Sheet which inquires of the applicant's marital status, and the rationale for the preference for female personnel managers. Miss Sendall knew these policies and was merely the corporate instrument for exercising them. Consequently, the Respondent put Miss Sendall in the position within the company of making the initial decision of whether or not to recruit an applicant and her contraventions of the Ontario Human Rights Code were in accord with well-settled



company policies. Thus the acts of Miss Sendall must be imputed to the Respondent company.

Nor can section 4 (6) assist the Respondent in this case.

That section reads:

The provisions of this section relating to any discrimination, limitation, specification or preference for a position or employment based on age, sex or marital status do not apply where age, sex or marital status is a *bona fide* occupational qualification and requirement for the position or employment.

The basic purpose of this exception is to exempt from the proscription against sex or marital status discrimination in hiring practices those occupations in which sex or marital status is essential to the successful performance of the job. An attempt was made to justify the discriminatory practices by suggesting that first, sex was a *bona fide* occupational qualification and requirement of the job of personnel manager and secondly, that marital status, to the extent that an individual not be divorced within two years was a *bona fide* qualification and requirement of any managerial post. They are both fanciful. With respect to the former, Mr. MacPherson gave the explanation that: "It's a known fact from sixteen years in business that a female would not come to a male personnel manager with personal problems". No evidence was led by the Respondent that there was any real basis for Mr. MacPherson's opinion. There was no evidence that women would not confide in men just as readily. In fact, a male has never occupied the position of personnel manager in the Respondent company and thus the company has no experience upon which to conclude that a woman would not as readily turn to a male personnel manager. In any event, if Mr. MacPherson's visceral feelings about this were true, it would mean that many male-dominated professions, such as psychiatry, would never attract female patients who were in need of pro-

fessional assistance with respect to their personal problems.

The burden of proof lies with the Respondent to show that subsection (6) of section 4 (1) applies and that burden has not been discharged: See Shack v. London Drive Ur Self Ltd. et al (Board of Inquiry, June 7, 1974 at p. 19). Moreover, the essence of the business responsibilities of a personnel manager is not counselling the female staff about personal difficulties. It is only part - and a small part indeed - of his or her duties which include scheduling of staff, payroll, interviewing applicants, hiring, supervising staff generally et cetera. The exception contained in section 4 (1)(6) applies only when discrimination based on sex affects the Respondent's business as a commercial enterprise and the primary function of the business or the enterprise would be undermined by not hiring members of one sex exclusively: See Diaz v. Pan Am World Airways Inc. (1971) 442 F. 2d. 385, cert. denied (1971) 404 U.S. 950.

Mr. MacPherson stated the policy behind the negative scoring for a person who has been divorced within two years. He said that in seeking candidates for management positions, the Respondent is looking for individuals with an established success pattern and a history of stability. This usually manifests itself in someone who has been married for a long period or employed in one position for some time. He reasoned that a person who has been recently divorced is generally in turmoil and therefore unstable. Such generalization on the part of the Respondent's management is totally without foundation. No expert evidence, of course, was adduced to support this proposition. It is just as conceivable that a married individual enduring severe marital difficulties could be unstable. Recent divorce is not necessarily a telltale of instability and the Respondent's discrimination in this respect cannot be justified.



The important principle underlying the Ontario Human Rights Code is the recognition that people are individuals and that there are no stereotypes.

That leaves the question of relief. The Respondent is required to forthwith direct its personnel managers that in all hiring practices, men and women are to be treated equally and they are to be instructed that the question in the Preliminary Interview Sheet and the Wrap-Up Kit relating to marital status (i.e. Question 4 in Exhibit 13 and Question 7 in Exhibit 10) are to be deleted immediately. A letter of assurance is to be written by the Respondent to Mr. Robert McPhee, Director of the Human Rights Commission, that it will, in the future, submit for periodic scrutiny of company policy, upon request, any of its current directives or kit material guiding the hiring of personnel. Evidently this practice has recently commenced to some extent between the Respondent and the Human Rights Commission and the Board encourages its continuation.

Furthermore, in consultation with the Human Rights Commission, the Respondent, at its own expense, shall forthwith engage an independent personnel agency or firm of management consultants to conduct a full interview of the Complainant. If a mutually satisfactory agency cannot be agreed upon, I may be spoken to. The agency should utilize the Respondent's own tests and questionnaires, purged of any material offensive to the Ontario Human Rights Code, to determine if the Complainant on his own individual merit could qualify for the personnel management trainee position or the credit management trainee position. An important consideration is the fact that the Complainant is and has been carrying on his own private divorce consulting business which occupies, on the average, twelve hours of his time per month. It was and still is his intention to continue

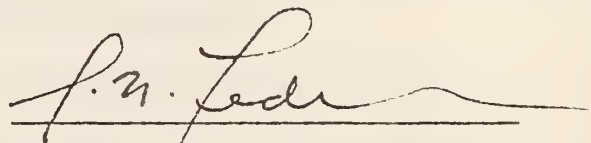
with that vocation even if successful in securing employment with the Respondent. The agency, therefore, will have to determine whether the Respondent has as a policy the prohibition of any of its managerial staff carrying on an outside business enterprise. If the Respondent indicates that it has such a policy, the agency should satisfy itself that it is a genuine policy and not recently manufactured solely to exclude the Complainant from its employment. An examination of the policies of other large businesses similar to that of the Respondent may be a helpful guideline. If the Complainant successfully completes this testing, then the Respondent is required to offer the Complainant the position. Whether the Complainant accepts the position or not, he will then be entitled to receive by way of compensation, damages for the periods of time that he was unemployed after September 24, 1974, at the rate of \$100.00 per week, being a personnel management trainee's salary at the relevant time. That was the job the Complainant initially sought. The Commission did not prove when the training period terminates in the ordinary case so the damages will be calculated on that scale and not on the higher personnel manager's salary. The periods of unemployment occupied twelve and one-half weeks and therefore the Board orders compensation in the amount of \$1,250.00, conditional upon the Complainant successfully completing the aforementioned testing to the satisfaction of the independent agency.

I do not think that the Ontario Legislature in delineating the prohibitive grounds for discrimination in Section 4 (1): race, creed, colour, age, sex, marital status, nationality, ancestry, or place of origin - intended to establish either in a descending or an ascending order any degrees or differences in the kind of discrimination practised. Sex discrimination or discrimination because of marital status cannot be

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considered per se less offensive than racial discrimination. All of these acts are degrading and dehumanizing. The Complainant indicated that he was upset by the treatment he received at the interview. He was sufficiently provoked to complain to the Ontario Human Rights Commission that very day. Thus, as in other cases, a general damage award is appropriate. Given the fact that the Complainant is a member of a traditionally regarded majority class - the males - but also taking into account that the discrimination practised in the instant case was overt and blatant, and considering all the circumstances, an award of \$75.00 represents proper compensation for the insult and humiliation that the Complainant suffered. This amount is payable by the Respondent regardless of the outcome of the tests to be administered to the Complainant.

DATED at Toronto this ~~22nd~~ day of September 1975.

A handwritten signature in dark ink, appearing to read 'S.N. Lederman', written over a horizontal line.

S.N. Lederman
Chairman, Board of Inquiry

IN THE MATTER of the Ontario Human Rights Code
R.S.O. 1970, C.318, as amended.

AND IN THE MATTER of two Complaints made by
Mr. Kerry Segrave of Hamilton, Ontario that
he was refused recruitment, refused employment
and refused training because of his sex and
marital status by Zeller's Limited and that
Zeller's Limited established or maintained
an employment classification or category
that by its description or operation excluded
persons from employment.

O R D E R

This matter coming on for hearing on the 26th day of August, 1975, before this Board of Inquiry, pursuant to the Appointment of the Honourable John P. MacBeth, Minister of Labour, dated the 29th day of July, 1975, in the presence of Counsel for the Human Rights Commission and the Complainant, Kerry Segrave, and Counsel for the Respondent, Zeller's Limited, upon hearing read the Complaint, as amended, and the evidence adduced and what was alleged by Counsel:

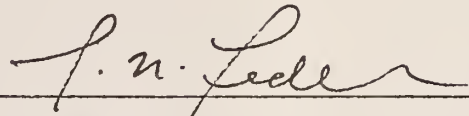
1. It is ordered that the Respondent forthwith direct its personnel managers that in all hiring practices, men and women are to be treated equally and they are to be instructed that the questions in the Preliminary Interview Sheet and the Wrap-Up Kit relating to marital status (i.e. Question 4 in Exhibit 13 and Question 7 in Exhibit 10) are to be deleted immediately.
2. And it is ordered that the Respondent write a letter of assurance to Mr. Robert McPhee, Director of the Human Rights Commission, that it will, in the future, submit

for periodic scrutiny of company policy, upon request, any of its current directives or kit material guiding the hiring of personnel.

3. It is further ordered that, in consultation with the Ontario Human Rights Commission, the Respondent, at its own expense forthwith engage an independent personnel agency or firm of management consultants to conduct a full interview of the Complainant. The agency is to utilize the Respondent's own tests and questionnaires, purged of any material offensive to the Ontario Human Rights Code, to determine if the Complainant on his own individual merit could qualify for the personnel management trainee position or the credit management trainee position. If the Complainant so qualifies, the Respondent is required to offer the Complainant the position.
4. It is further ordered that, if the Complainant successfully completes the aforementioned testing, the Respondent company is to pay the sum of \$1,250.00 by way of compensation to the Complainant.

5. It is further ordered that, in any event, the Respondent pay the sum of \$75.00 by way of compensation to the Complainant.

DATED this *22nd* day of September, 1975.

A handwritten signature in cursive script, appearing to read "S.N. Lederman", written over a horizontal line.

S.N. Lederman
Chairman, Board of Inquiry

